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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
The United States Court of Appeals
For the Fourth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, & FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION, IN SUPPORT OF AFFIRMING THE DECISION OF THE U. S. COURT OF APPEALS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus curiae National Association of Police Organizations, Inc. ("NAPO"), submits this brief in support of affirming the decision of the U.S. Court of Appeals for the Fourth Circuit, and is joined in this brief by *amici curiae* the International Brotherhood of Police Officers and the Federal Law Enforcement Officers Association.[1]

NAPO is a national non-profit organization, representing state and local law enforcement officers throughout the United States. Specifically, NAPO is a coalition of associations and unions that serves to advance the interests and legal rights of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 organizations, with over 230,000 sworn law enforcement officers and 11,000 retired officers.

The International Brotherhood of Police Officers (IBPO) is an affiliate of the Services Employees International Union. The IBPO represents over 50,000 police officers throughout the Nation and is the largest police union in the AFL-CIO.

The Federal Law Enforcement Officers Association (FLEOA), with more than 8,000 members, is the largest professional association in the nation exclusively representing federal law enforcement officers and criminal investigators from 38 agencies.

Amici have a significant interest in the important issue before this Court. We offer the perspective of *amici*'s organizations and their members, the men and women "on the street" who have dedicated their professional lives to the enforcement of our laws. From that perspective, we believe that this case offers the Court

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Both Respondent and Petitioner have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

the opportunity to speak clearly about the principles of justice memorialized in the Fifth Amendment that are at stake in this case, which includes identifying and punishing those who commit crimes, without coerced self-incrimination. Interrogation of criminal suspects is a recognized and integral component of law enforcement, necessary in many cases to arrive at truthful information concerning the facts and circumstances of criminal activity. Confessions and statements from criminal suspects are inherently reliable and beneficial to society as a whole, as long as they are obtained through constitutional and non-coercive means. Thus, the constitutional principles governing interrogations that are at issue in this case play a central role in the day-to-day professional lives of *amici*'s 288,000 member officers.

STATEMENT OF THE CASE

The events that bring this case to the Court were set in motion by a 1997 armed bank robbery in Alexandria, Virginia, and the incriminating statements made by Petitioner Charles Dickerson to FBI Special Agents during a subsequent interview at the FBI's Washington, D.C. Field Office.

The FBI had been led to Petitioner by the fact that the getaway car, observed by a witness at the scene, was registered to him. After a short, initial conversation at Petitioner's apartment, he agreed to voluntarily accompany the FBI Special Agents to their Field Office. At the outset, Petitioner admitted to being at the scene in his car, but denied any involvement in the crime. Petitioner refused to consent to the agents' search of his apartment. Although the district court subsequently found that Petitioner was in custody, at the time he was not under arrest. The fact that he was not under arrest was one exigent circumstance that spurred the agents to obtain an immediate search warrant by telephone for Petitioner's apartment.[2]

[2] The search of Petitioner's apartment turned up a handgun, dye-stained money, a bait bill from an earlier robbery, and other evidence, which implicated Petitioner "in multiple bank robberies and an armed car-jacking during which a gun was taken that later was used to murder an off-duty correctional officer." J.A. 86

At some point after the agents told Petitioner that they were going to search his apartment, he made a statement in which he denied his involvement in the bank robbery but identified James Rochester as the person who had accompanied him to Alexandria. Petitioner described various suspicious actions of Rochester after they left the scene. This included asking Petitioner to stop so Rochester could put something into the trunk, asking Petitioner to run a red light and giving Petitioner a silver handgun and some dye-stained money. Petitioner advised the agents that he suspected Rochester of having committed a robbery, especially since Petitioner knew that Rochester came to D.C. after committing several robberies in Georgia. (Rochester later admitted to robbing several banks in the D.C. area, and stated that Petitioner was his getaway driver in each of these robberies.)

The Petitioner moved to suppress his statements. The key issue before the district court was a dispute over whether Petitioner was given his *Miranda* warnings before or after these statements. Petitioner did not try to establish that his statements were in some way coerced by the FBI agents or to claim in any other way that they were actually involuntary. The district court concluded that Petitioner had been in custody during the interview and that he had not been advised of and waived his *Miranda* rights until after he had made the statements at issue, notwithstanding a hand-written note from Petitioner, indicating he was read his rights before he made any incriminating statements. Consequently, Petitioner's statements were suppressed.

The Fourth Circuit reversed the exclusion of the incriminating statement (and other evidence) on the grounds that 18 U.S.C. § 3501, rather than *Miranda*, governs the admissibility of confessions, and that the district court had found that Petitioner's confession was completely voluntary. The Fourth Circuit expressly found that the *Miranda* formula was not constitutionally

compelled.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the power of Congress to make a judgment different from that of this Court regarding the practical mechanism best suited to preserve the principles of justice articulated in the Fifth Amendment's provision that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This Court, in its 5-to-4 decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), held that all statements obtained from a criminal defendant in custody, without law enforcement officers first having advised that defendant of certain rights, are presumed to be the result of coercion in violation of the Fifth Amendment and cannot be admitted in the prosecution of that defendant. Just two years later, accepting the *Miranda* Court's explicit invitation to develop its own safeguards for the rights at issue, Congress enacted 18 U.S.C. § 3501. In doing so, Congress did not reject the *Miranda* formula, but concluded that the reciting of that formula should be one of several factors in an inquiry that focused on the key constitutional issue, that is, whether a statement from a defendant was voluntarily given. In sum, section 3501 provides that the "presence or absence" of the *Miranda* warnings and the defendant's knowledge of the nature of the offense for which he was charged or suspected at the time of his confession, while taken into consideration by the judge, "need not be conclusive on the issue of voluntariness of the confession." 18 U.S.C. § 3501(b).

However well intentioned, the teaching of *Miranda* can now be seen as flawed in critical respects. *Miranda* created a logic that is unfaithful to the Constitution and the particular rights at issue here. In addition, the logic of *Miranda* wrongly juxtaposes the interests of law enforcement with the rights of defendants and ultimately is at war with the fundamental proposition from which all rights and duties arise: unless immature or otherwise incompetent, all human beings have the unique capacity to know right from wrong and can be held accountable when they are guilty of a criminal act. Indeed, it is the basic and solemn commission of all

who participate in the rendering of justice, whether in law enforcement, in the judiciary, or in the penal system, to faithfully determine, according to their particular roles, who committed a crime and whether punishment is justified or unjustified. These tasks have meaning only because of the capacity, indeed the dignity, of human beings as moral agents. Consequently, the *Miranda* formula is at odds with the values of the Fifth Amendment, offers only the illusion of a "bright line" to preserve those values, brings the criminal justice system into disrepute, and sets up an artificial tradeoff between the constitutional right against compelled self-incrimination and the interests of society in fair and effective law enforcement.

Under the mischievous influence of the flawed logic of *Miranda,* we see here Petitioner and his *amici* offering broad claims that the rigid application of the *Miranda* formula actually serves the principles of the Fifth Amendment, advances the interests of effective law enforcement, and encourages public confidence in the criminal justice system. Each of these claims is not only wrong but at odds with the elementary notions of justice.

We are justified in punishing someone only because we have carefully – even scrupulously – determined that that person committed a crime. Justice requires that the guilty be identified, tried, and punished, and that the innocent go free. In essence, the judgment of any tribunal that a defendant is guilty must be *true.* It is that core truth in imposing a criminal sanction – that such a sanction is truly justified – which gives the public confidence in the criminal justice system. The purpose of police questioning of a suspect or witness is to arrive at the truth. A coerced confession is a double-barreled vice: it produces "evidence" that is inherently unreliable, at odds with the mission of the police to find the truth, and it is an affront to the dignity of an individual as a moral agent.

Under the rigid application of the *Miranda* formula urged as a constitutional litmus test by Petitioner and his *amici,* the absence of any coercion by the police during a custodial interrogation, and the complete voluntariness of an incriminating statement that results, are of no significance whatsoever. Under this regime, the

Miranda formula becomes the quintessential "technicality," a vehicle inviting unnecessary efforts to exclude reliable and uncoerced statements. As a result, the process of criminal justice is reduced to a game, where the incantation of magic words offers no advantage to the innocent, but serves instead to give the guilty a "sporting chance" of acquittal.

Effective law enforcement is not aided by an inflexible reliance on the *Miranda* formula, for the variety of people and circumstances governed by our criminal laws is simply not susceptible to the mechanical application of a "bright-line" rule in this area. Even the *Miranda* "bright line" is only triggered when a suspect is in "custody," which, among other issues, remains a fertile subject for the energies of the adversaries in a criminal proceeding. Rather, judgment, in the first instance by professional law enforcement officers schooled in the constitutional principles they are sworn to uphold, and ultimately by the courts, will always be necessary when the focus is properly on the objective of the Fifth Amendment.

While the *Miranda* formula may still be used under the framework set out by Congress in section 3501, that structure realistically broadens the judicial inquiry to consider all of the circumstances surrounding an incriminating statement. It thus ensures that involuntary statements are excluded from the determination of a defendant's guilt, while voluntary statements will be admitted – even if an officer is mistaken about the suspect being in custody, gives imperfect *Miranda* warnings, gives them at the wrong time, or gives no warnings. The result achieved by an inquiry under section 3501, although different from the "prophylactic" procedure established by the *Miranda* Court, is faithfully grounded on constitutional principles, better serves the cause of justice, and can only raise the esteem in which the public holds the criminal justice system and the professionals sworn to uphold it.

ARGUMENT

The Solicitor General and several *amici* supporting Petitioner, purporting to represent the interests of those who are, or have been, involved in law enforcement, urge the Court to hold

section 3501 to be unconstitutional, because, in their view, the statute falls short of the requirements of the Fifth Amendment's Self-Incrimination Clause. They claim first, that the *Miranda* formula not only is faithful to the core values of the Fifth Amendment, but is actually "beneficial to law enforcement," Brief for the United States ("U.S. Br.") at 9, second, that it provides law enforcement with "a simple and consistent protocol," Brief of Griffin B. Bell, *et al.* as *Amici curiae* in Support of Petitioner ("Bell *Amici* Br.") at 2, and third, that, having "withstood the test of time, *id.* at 3, "it promotes public confidence that the criminal justice system is fair." U.S. Br. at 49.

Representing hundreds of thousands of local, state, and federal law enforcement officers whose daily professional lives are filled with making arrests, interrogating suspects, and testifying in criminal prosecutions, *amici* NAPO, IBPO, and FLEOA strongly disagree. Congress crafted section 3501 with an obvious appreciation of the variety of circumstances in which interrogations occur. This statute puts in place a framework for interrogations that recognizes that a confession may be voluntary even if the *Miranda* warnings are not given, and that the rigid application of the *Miranda* formula, far from benefiting law enforcement, creates a wholly unnecessary yet "profound cost to the truth-finding function of a criminal trial." U.S. Br. at 9.

I. SECTION 3501 BETTER SERVES CORE FIFTH AMENDMENT VALUES THAN THE RIGID APPLICATION OF THE *MIRANDA* FORMULA.

The right against compulsory self-incrimination has been protected in our legal system by the law of evidence, by the Self-Incrimination Clause of the Fifth Amendment, and by the Due Process Clause of the Fourteenth Amendment. *See Michigan v. Tucker*, 417 U.S. 433, 439-42 (1974); Joint Appendix ("J.A.") 192-95; OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: THE LAW OF PRETRIAL INTERROGATION 3-22 (1986) ("OLP Report"). Before *Miranda* was decided, the central inquiry in determining whether a self-incriminating statement could be used against a defendant was whether the statement had been

made voluntarily. *Lisenba v. California*, 314 U.S. 219, 236 (1941); *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring). ("[V]oluntariness *vel non* was the touchstone of admissibility of confessions" up to *Miranda*.).

Even though *Miranda* established a new regime for protecting Fifth Amendment rights, the principle of voluntariness was essential to the Court's conclusion that custodial interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Thus, the *Miranda* formula fully recognized the key role voluntariness plays in the operation of the Fifth Amendment, and was designed to ensure that incriminating statements were voluntarily made.

As we will discuss below, experience has now shown that the *Miranda* formula, unfortunately, is not the reliable bulwark for voluntary confessions the *Miranda* Court may have thought. Even worse, as the operation and logic of the *Miranda* formula has unfolded over the years, that formula can be seen as at war with the core Fifth Amendment values served by the voluntariness standard. Two such core values, rooted in the beliefs of the Framers, have figured prominently in the Court's thinking: that confessions compelled by the government "may lead to the conviction of innocent persons," and that such coercion "is often an adjunct to tyranny." *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring).

A. Undeniably, admissions of guilt "are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). When the Court speaks of the enterprise of criminal justice in this way, it is speaking of "settling the cases in which punishment is *justified* or *unjustified* . . . . [I]t is . . . speak[ing] of establishing whether someone is guilty of a wrong, and therefore deserves punishment." HADLEY ARKES, BEYOND THE CONSTITUTION 184 (1990). As a result, the "logic of rendering justice begins by commanding our respect for the moral differences that

separate . . . the innocent from the guilty." *Id. See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (explaining that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence"). Accordingly, one core Fifth Amendment value is the avoidance of coercion to ensure the veracity of a confession, and so to advance the primary goals of a criminal trial: finding and punishing the true wrongdoer and exonerating the innocent.

The common sense of this proposition has long been reflected in the Court's jurisprudence. As long ago as *Hopt v. Utah*, 110 U.S. 574 (1884), this Court pointed out:

> Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession.

Id. at 584-85. *See also United States v. Carignan*, 342 U.S. 36, 41 (1951) (noting that one basis for excluding involuntary confessions is "that forced confessions are untrustworthy"); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) ("[T]he trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence.").

The importance of this right against compulsory self-incrimination to reaching true verdicts in the criminal process has not diminished since *Miranda* was decided. The Court has underscored that *Miranda* was not intended to "serve some value necessarily divorced from the correct ascertainment of guilt." *Withrow v. Williams*, 507 U.S. 680, 692 (1993). *See also Tucker*, 417 U.S. at 448 (noting that one justification for the Fifth Amendment's exclusionary rule is "protection of the courts from reliance on untrustworthy evidence"); *Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring).

Thus, one core dynamic of the Fifth Amendment is the linkage between *voluntary* self-incrimination and "the correct ascertainment of guilt," that is, the truth. Unfortunately, experience over the last 30 plus years shows that the *Miranda* formula has the effect of severing that link, in the end establishing neither the voluntariness of a confession nor the truth. *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW *vi* (1996) ("*Miranda's* philosophical premises are pernicious precisely because they are indifferent, perhaps even hostile, to the goal of ascertaining the truth.").

The reason for this impact of the *Miranda* formula is apparent: the rigid insistence on the incantation of that formula as the prime determinant of the admissibility of an incriminating statement. As the Court has candidly observed:

> [U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda's* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.

Oregon v. Elstad, 470 U.S. 298, 307 (1985). Indeed, in *Miranda* itself, no reasonable review of the facts supports the notion that Ernest Miranda was compelled to confess by Phoenix police officers. *See* Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 181-91 (1999) ("*The Statute That Time Forgot*").

Here, too, the record does not present a picture of a defendant who was coerced by police officers to confess, *see* J.A. 167-71, and neither the Petitioner nor any *amici* claims that Charles Dickerson's incriminating statements were involuntary. Clearly, the exclusion of voluntary statements, not in any way compelled by police officers, is drastically at odds with the value of truth-finding and serves no value conceivably embraced by the Fifth Amendment. Indeed, an observation of Justice O'Connor, made in a slightly different context but pertinent here, comes to mind:

> Exclusion in such a situation teaches not respect for the law, but casts the criminal system as a game and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns.

Duckworth, 492 U.S. at 212 (O'Connor, J., concurring).

Moreover, the dynamic of the *Miranda* formula, with its focus on procedural technicalities, has "led the courts away from any close scrutiny of voluntariness – and hence, trustworthiness – in individual cases." Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions – And from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 544 (1998). The superficiality of the *Miranda* formula provides limited protection for the rights of the most vulnerable, innocent suspects. *See id.* at 538-56. For example, "mental retardation may not be apparent at the time of interrogation," President's Panel on Mental Retardation, Report of the Task Force on Law 33 (1963), and such a suspect may hear the *Miranda* formula and proceed to make an apparently knowing, voluntary "confession," all the while being in fact so incompetent as to render that confession fundamentally untrustworthy.[3]

In contrast, section 3501 recognizes that *Miranda*-like warnings may be helpful in assuring the voluntariness of self-incriminating statements but properly makes that element only one of several considerations that a trial judge must take into account in evaluating the voluntariness of a confession. 18 U.S.C. § 3501 (b). As discussed below, the more flexible framework of section 3501 responds more effectively to the real-world exigencies of law enforcement. In short, section 3501 in no way diminishes the Fifth Amendment's guarantee against compelled self-

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[3] *See, e.g., Blackburn v. Alabama*, 361 U.S. 199 (1960) (excluding as involuntary, under the pre-*Miranda* totality-of-the-circumstances approach, the confession of a mentally incompetent person who neither remembered the crime nor his confession, but who appeared normal).

incrimination, while it avoids the practical hostility of the *Miranda* formula to the truth.

The Petitioner's criticism of section 3501 illustrates how far removed the logic of *Miranda* is from the values of the Fifth Amendment. "If the government is allowed to keep its suspect in a state of ignorance," which Petitioner claims is the effect of section 3501, "the Fifth Amendment protections are reduced to a mere ' "form of words." ' " Brief of Petitioner ("Pet. Br.") at 3. But, it is Petitioner's rigid insistence on the *Miranda* formula as the essential criterion of voluntariness that reduces Fifth Amendment values to a "mere form of words," irrelevant to whether a self-incriminating statement was given without government coercion.

Moreover, the "Fifth Amendment itself does not prohibit all incriminating admissions; '[absent] some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.' " *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)). The Self-Incrimination Clause protects a suspect from government coercion alone. The Fifth Amendment simply is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion." *Elstad*, 470 U.S. at 304-305. *See also Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (rejecting the proposition that "a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness' ").

Thus, the failure to recite the *Miranda* formula is not equivalent to the *government* "keeping the suspect in a state of ignorance." To be sure, ignorance alone implicates no principle safeguarded by the Fifth Amendment or by any other constitutional norm. Beyond the clear teaching of this Court to this effect, no principle of reason or justice supports Petitioner's claim. What could an innocent suspect be ignorant of? In the absence of police coercion, does Petitioner seriously contend that the innocent suspect will be "ignorant" of the notion that he should not confess to

a crime that he did not commit? If he is, we suggest that such a hypothetical suspect would have to be mentally incompetent; as we pointed out above, only the fuller evaluation of section 3501's approach, and not the simple stating of the *Miranda* formula, is likely to protect such an unusually vulnerable person.

Again, in the absence of police coercion, any "ignorance" which leads the guilty subject to confess does not violate either the letter or the spirit of the Fifth Amendment. To exclude such a confession would not protect the suspect from the consequences of a coerced confession, for there was none, but would deprive the court of highly trustworthy evidence. In short, under Petitioner's view, we pay the profound cost of depriving the factfinder of the truth, while in no way protecting the Fifth Amendment right against compelled self-incrimination. This is the inevitable and pernicious result of the *Miranda* formula.

B. Although the core commitment of the Fifth Amendment to true verdicts is fundamental, it is not the exclusive value animating the Constitution's antagonism to coerced confessions. The Court's opinions have circled a "transcendent" value underlying the Fifth Amendment,[4] reflecting "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' " *Withrow*, 507 U.S. at 692 (quoting *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964)).

This value of the Fifth Amendment really centers on the

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[4] In this regard, the Court has pointed to "considerations which transcend the question of guilt or innocence." *Blackburn*, 361 U.S. at 206. Sometimes the Court refers to "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Brown v. Mississippi*, 297 U.S. 278, 286 (1936), or to "the important human values [that] are sacrificed" when government coerces a confession. *Blackburn*, 361 U.S. at 206. This other core value has been described as hostility to "tyranny," *Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring), or to the "fundamental unfairness" of coerced confessions, "whether true or false." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Framers' understanding of the dignity of each human person:

> [T]he right against self-incrimination did evolve as an essential part of due process and as a fundamental principle of liberty and justice. Thus Ben Franklin in 1735 called it a natural right ("the common Right of Mankind"), and Baron Geoffrey Gilbert, the foremost English authority on evidence at the time, called it part of the "Law of Nature."

LEONARD W. LEVY, *The Right Against Self-Incrimination: History and Judicial History*, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 268 (1972).

Not only the right against self-incrimination, but our whole system of laws rests on our unique dignity as human beings, that is, our nature as moral agents. The moral logic of the law arises from that nature and from the recognition that each competent adult can know what is right and what is wrong, and do what is right and refrain from doing what is wrong. *See generally* Arkes, *supra*, at 199 ("The dignity of a moral agent arose from his capacity to give reasons over matters of right and wrong .... A moral agent would understand that he was obliged to do what was right and refrain from what was wrong."). Therefore the law is justified in punishing people who commit wrongs and is not justified in punishing the innocent.

The Fifth Amendment recognizes and preserves our dignity as moral agents by insisting on drawing the moral differences between the innocent and the guilty "in the most solemn and reasoned manner," *id.* at 184, a manner that recoils from the injustice of coerced confessions. Yet, an unavoidable corollary of this rejection of compelled self-incrimination is that a truly voluntary confession – naming and taking responsibility for a wrong committed – is profoundly consistent with and indeed *affirms* our dignity as moral agents.

With this understanding, a voluntary confession is to be encouraged, which the criminal law (apart from the *Miranda* formula) does. For example, a "confession is rightly regarded by the

Sentencing Guidelines as warranting reduction of sentence, because it 'demonstrates a recognition and affirmative acceptance of personal responsibility for . . . criminal conduct.' " *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting). *See also Miranda*, 384 U.S. at 538 (White, J., dissenting) ("[T]he process of confessing . . . may provide psychological relief and enhance the prospects for rehabilitation.").

The logic of the *Miranda* formula, however, inexorably works to corrode the moral dignity that is the ground of our Fifth Amendment rights. Witness, for example, the equating of an "appeal to a suspect to confess for the sake of others, to 'display some evidence of decency and honor,' " with the application of illicit "pressure" to unconstitutionally manipulate a suspect into a confession. *Rhode Island v. Innis*, 446 U.S. 291, 305-307 (1980) (Marshall, J., dissenting). The logic of *Miranda* and its progeny thus rests on a premise that "a rational man would never respond *rationally* to appeals for repentance or contrition." ARKES, *supra*, at 202. At best, such a notion is nonsense, essentially claiming that it is not reasonable for a suspect to act according to his nature as a being who can reason, that is, as a moral agent who can understand right and wrong. At worst, this premise is profoundly hostile to any claim that we are by nature moral agents and so entitled to any rights at all.

To be sure, we agree with the Court's observation in *Minnick*:

> Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system. It does not detract from this principle, however, to insist that neither admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause.

498 U.S. at 155. Congress, in the framework of section 3501, established those assurances. As we will now explain, the rigid regime of *Miranda* does not achieve that end and, in fact, detracts

from it.

II. THE *MIRANDA* FORMULA DOES NOT PROMOTE THE TRUTHFINDING FUNCTION OF EFFECTIVE LAW ENFORCEMENT.

As organizations with hundreds of thousands of experienced local, state, and federal law enforcement professionals, *amici* are in a position to offer the Court meaningful practical insights into the deleterious effects of *Miranda* on the truth-seeking function of law enforcement and on the role of interrogation in that enterprise. Contrary to the suggestions of those in favor of reversing the judgment below, *Miranda* does not benefit law enforcement, and is not necessary to conduct interrogations within constitutional bounds.

A. The *Miranda* Formula Is The Classic "Technicality" That Undermines Public Confidence In Criminal Justice By Excluding Voluntary, Reliable Confessions.

As the Solicitor General admits, *Miranda* imposes costs on the truth-seeking function of a trial by excluding relevant, voluntary and reliable evidence. U.S. Br. at 31-32. Claims that *Miranda* is "workable in practice," "not difficult to administer," and "generally workable," and that *Miranda* "generally does not hinder [law enforcement] investigations" are not true, serve only to mask the fact that the *Miranda* formula is *not* a benefit to law enforcement, and certainly do not justify the exclusion of voluntary statements on the basis of technical violations of *Miranda*. *Id.* at 32-35.

Law enforcement officers are professionals trained to obtain truthful information and sworn to abide by the Constitution. Officers investigate crimes and seek to find the perpetrator; no one seriously disputes that interrogations are an invaluable component in the law enforcement arsenal precisely because they are inherently reliable and often necessary to arrive at the truth. Even when investigated by the most qualified police investigators, it takes an admission or confession from the guilty individual, or information

obtained from other suspects, to solve many cases.[5] Thus, even if one rejects the premise that voluntary admissions of guilt yield moral benefits to the defendant, it is beyond question that the "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (internal citation omitted).

The *Miranda* formula is the archetypal "technicality" which undermines confidence in the criminal justice system and brings it into disrepute. Voluntary, reliable confessions are excluded from evidence and withheld from the trier of fact for technical violations of *Miranda*, even when there is no suggestion of police overreaching, wrongdoing, or external coercion of any kind. A *Miranda* violation requires neither police overreaching *nor anything beyond a technical error:* "Even the forgetful failure to issue warnings to the most wary, knowledgeable, and seasoned of criminals will do." *Withrow*, 507 U.S. at 708-09 (O'Connor, J., dissenting). The law enforcement professional, whose sole purpose is apprehension of the true perpetrator of a crime and who is schooled in the requirements of the Constitution, can nonetheless be hoisted on the petard of mistake or inexactitude (such as the issue of "custody") even when no constitutional violation occurs.

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[5] The contention of *Amici* Griffin B. Bell, *et al.*, that "[m]any defendants can be convicted without confession evidence," Bell *Amici* Br. at 7 n.3, overlooks, or side-steps, cases where the perpetrator may be the only witness capable of testifying (*e.g.*, murder, child molestation), as well as cases which never go to trial because the prosecutor deems the case "too weak" or "lacking in prosecutorial merit" without a confession. It further ignores the real social costs imposed as a consequence of "lost" confessions, gifts of leniency granted to culpable co-conspirators and cooperating witnesses, and cases where a confession would have significantly lessened the time and expense of the investigation. *See* Paul G. Cassell & Bret S. Hayman, *Dialogue on Miranda: Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 906 (1996) (prosecutors report that 61 % of confessions are "essential" or "important" to the prosecution), *id.* at 911-15 (collecting data and finding statistically significant difference in outcome of cases depending on whether the suspect was successfully questioned).

Consequently, the substantial costs of excluding reliable evidence are incurred, with no corresponding benefit to an individual's constitutional rights.

As a result of *Miranda*, the law enforcement professional, no matter how careful, is faced with a phalanx of defense attorneys seeking to exclude voluntary, reliable confessions on the basis of a technicality. Neither the constitutional rights of a suspect nor the truth-seeking function of a trial are advanced thereby. Rather, this process, which may return dangerous criminals to the street, takes on the appearance of a game. *Amici* adamantly believe that society's knowledge that a confessed guilty person is set free because of inadvertent technical errors related to the *Miranda* warnings does not increase public confidence in the criminal justice system. Rather, the *Miranda* formula has been the cradle of the popular expression that someone "got off on a technicality," which reflects a well founded unease with the focus of the *Miranda* formula on a right to exclude voluntary confessions and its practical results in many cases.[6] Section 3501's focus on the

[6] How Petitioner and the Solicitor General can claim that jettisoning the rigid *Miranda* formula will erode "public confidence" in the criminal justice system we do not know, since neither cites any supporting authority for such claims. *See* Pet. Br. at 44, U.S. Br. at 10, 49. The experience of *amicis'* members and common sense suggest that the exact opposite is true. For examples of negative public perceptions regarding the societal impact of *Miranda*, see, e.g., Linda Chavez, *Hesitation Waltz at Justice*, WASH. TIMES, Oct. 7, 1999, at A18 ("The Justice Department can't make up its mind whether its job is to put dangerous criminals behind bars or to set them free on a technicality."); Ann Coulter, *Challenging Miranda*, CHATTANOOGA TIMES, Oct. 8, 1999, at B7 ("Though not admissible in state court, Roger's confession is admissible in federal court – if only Janet Reno would enforce the law. . . . Enacted in 1968 in response to *Miranda* . . . Section 3501 reiterates the constitutional standard."); Morgan Reynolds, *It's Time to Overturn Miranda*, CHICAGO TRIB., Dec. 5, 1999, at 23 ("The U.S. Supreme Court has a magnificent opportunity to overturn its worst criminal ruling ever – the so-called *Miranda* warning. During the 1960's, the . . . majority on Earl Warren's court legislated new rights – privileges really – to help criminal suspects. Chief among them, as most viewers of TV cop shows know, was the *Miranda* ruling."); Opinion, *Miranda Wrongs; Supreme Court to Revisit*

exclusion of only involuntary statements properly returns the focus of criminal proceedings to the important guarantees of the Fifth Amendment and so restores public confidence in the law.

In fact, perversions of justice based on technical *Miranda* violations, detailed at the OLP Report at 122, and remands and reversals for the same technical violations, reported in Cassell, *The Statute That Time Forgot,* at 253-254, bring to mind Justice White's prophetic dissent in *Miranda*:

> "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime when ever it pleases him . . . . There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case."

384 U.S. at 542-543 (White, J., dissenting). Allowing Congress to adjust this dynamic within constitutionally permissible limits is hardly an affront to people's sensibilities.

B. The Supposed "Bright Line" Of The *Miranda* Formula Is Illusory, Creating Only A Chimera That Masks The Broad Range Of Issues That Still Remain In Any Application Of *Miranda*.

The *Miranda* formula is a one-way ratchet: failure to give

Landmark 1966 Ruling, SAN DIEGO TRIB., Dec. 8, 1999 ("[A] federal district court in Alexandria threw out [Dickerson's] voluntary confession. The FBI had obtained his admission of guilt before agents read him his Miranda rights. It appeared that Dickerson had beaten the rap on this technicality."); Ann Coulter, *We Can Do Nicely Without Miranda*, CHATANOOGA TIMES, Jan. 7, 2000, at B7 ("The Miranda warnings do not make things simpler, as is often claimed. They just give the guilty two bases on which to challenge a confession in the courts rather than one. With Miranda, confessed criminals can challenge not only whether they were given Miranda warnings at just the right time and under the proper circumstances, but also – even if they were – whether their confessions were voluntary. This is not a big time-saver. Instead of being on the street fighting crime, cops spend hours in court for suppression hearings.").

the warning results in exclusion of the statement, while recitation of the warnings does not guarantee the voluntariness or admissibility of the statement. ("*Miranda* can fail to exclude some truly involuntary statements: It is entirely possible to extract a compelled statement despite the most precise and accurate of warnings." *Withrow*, 507 U.S. at 712 (O'Connor, J. dissenting).)

The cost of the *Miranda* formula does not buy law enforcement professionals greater precision in complying with the Fifth Amendment than the "totality of the circumstances" test it supplanted. The *Miranda* formula is a bright line only in the sense that its requirements are facially straightforward and the warnings are either given or not given. However, a number of threshold issues must be addressed and decided on the spot by law enforcement officers. A misstep in regard to *Miranda* will be fatal to a prosecution, as the evidence will be excluded if a court determines, after the fact, that the officer's judgment was wrong. For example, issues that a court will decide include whether the suspect was in custody (so as to trigger *Miranda* requirements),[7] whether the warnings were given, and whether the waiver was knowing and voluntary. These issues are susceptible to more than one judgment:

> *Miranda* creates as many close questions as it resolves. The task of determining whether a defendant is in "custody" has proved to be "a slippery one." And the supposedly "bright" lines that separate interrogation from spontaneous declaration, the exercise of a right from a waiver and the adequate warning from the inadequate, likewise have turned out to be rather dim and ill defined.

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[7] *See, e.g.*, J.F. Ghent, *What Constitutes "Custodial Interrogation" Within Rule of Miranda v. Arizona Requiring that Suspect be Informed of His Federal Constitutional Rights Before Custodial Interrogation*, 31 A.L.R.3d 565 (2000). This article traverses, in the course of over 500 pages, many hundreds of decisions from state and federal courts on a single question: whether an individual was in custody.

Id. at 711 (internal citations omitted). As an essential part of the *Miranda* inquiry, these questions are fact specific and often based on the "totality of the circumstances."[8] Thus, a "multiplicity of factors" that "might bear on the voluntariness inquiry," Bell *Amici* Br. at 14 & n.14, remain. *Miranda*'s "bright" line requires as many "tests" and inquiries as any totality-of-the-circumstances examination of voluntariness, and certainly poses no less a drain on judicial time, as Justices White, Harlan, and Stewart correctly foresaw in their dissent in *Miranda*. *Miranda*, 384 U.S. at 544-45 (White, J., dissenting).[9]

The failure of *Miranda's* one-size-fits-all template to really serve as the claimed "bright line" reflects the fact that both the human beings who commit crimes and the circumstances in which they commit them are extraordinarily diverse. Fairly evaluating a suspect's incriminating statement by the standards of the Fifth Amendment can be complex, and irreducibly so. Law enforcement will always demand sound judgment, exercised quickly under highly stressful and rapidly changing circumstances. The *Miranda* formula has been shown not to be up to this task.

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[8] *See, e.g., United States v. Salvo*, 133 F.3d 943, 950 (6th Cir.) *cert. denied*, 523 U.S. 122 (1998) (weighing question of "custody" under the totality of the circumstances, citing factors); *Thasaphone v. Weber*, 137 F.3d 1041, 1043 (8th Cir.), *cert. denied*, 523 U.S. 1130 (1998) (same); *United States v. Garibay*, 143 F.3d 534, 537 (9th Cir. 1998) (determining validity of *Miranda* waiver under the totality of the circumstances); *United States v. Erving L.*, 147 F.3d 1240,1248 (10th Cir. 1998) (weighing question of "custody" under the totality of the circumstances, citing factors).

[9] *Cf. Duckworth*, 492 U.S. 195 at 207 (O'Connor, J. concurring) ("Eighteen state and federal judges have now given plenary consideration to respondent's *Miranda* claims. None of these judges has intimated any doubt as to respondent's guilt or the voluntariness and probative value of his confession."). Contrary to the Solicitor General's suggestion, U.S. Br. at 36, the totality-of-the-circumstances test would be hard-pressed to be *less* workable than *Miranda* proves in practice.

In contrast, section 3501 applies the Self-Incrimination Clause's voluntariness standard far more faithfully, effectively taking into account the real-world exigencies that can shape interrogation. The criticism that section 3501 is somehow more onerous or difficult for law enforcement to follow lacks support and credibility. *See, e.g.*, U.S. Br. 36-38. Just as *Miranda*'s "bright" line is a chimera, fallacious and illusory, the "onerous difficulty" of a true voluntariness inquiry evaporates upon reflection. The focus, after all, is solely on government coercion. Law enforcement professionals are well trained in the constitutional rights of suspects, and already deal with "totality-of-the-circumstances" analyses in many facets of their work. They seek only to obtain accurate, reliable, and voluntary statements. In doing so, they are well able to avoid overreaching and coercive police tactics. Section 3501 certainly opens those tactics to careful examination in court. As Justice Clark pointed out in dissent in *Miranda*:

> Rather than employing the arbitrary Fifth Amendment rule which the Court lays down I would follow the more pliable dictates of the Due Process Clauses . . . which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody.

384 U.S. at 503 (Clark, J., dissenting).

C. Modern Interrogation Techniques Further The Interest Of Society, While Protecting The Constitutional Rights Of Suspects.

Police officers are trained to exercise independent judgment in the fluid circumstances in which interrogation may occur and to avoid practices and situations that yield coerced or involuntary statements. Law enforcement officers are taught that coerced or involuntary statements are unreliable and that such statements violate the Constitution. As we have already pointed out, imposing *per se* prophylactic rules like the *Miranda* formula does not aid in the practical application of these principles.

Section 3501 properly focuses attention on the constitutional

requirements for criminal interrogations and on the interplay between law enforcement officers, suspects, and the truth. The Constitution does not require that a criminal suspect know and understand every possible consequence of waiving the Fifth Amendment privilege outside of a courtroom. *Colorado v. Spring*, 479 U.S. 564, 574 (1987). Further, the "relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers." *Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 2052 (1999). Interviews and interrogations, when properly conducted, seek the truth and do not constitute an abusive practice: "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns."[10] Law enforcement officers are not required to inform an individual of all information relevant or useful in making a decision whether to confess,[11] and "voluntary disclosure of a guilty secret" does not qualify as state compulsion.[12] The focus of law enforcement is to elicit truthful, reliable information within the constraints of the Constitution, in furtherance of investigating crimes, clearing innocent suspects, and convicting the guilty.

Interview and interrogation techniques that obtain voluntary, probative statements from suspects in accordance with constitu-

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[10] *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). While the "inherent compulsion" of interrogation by "law enforcement" was absent in Perkins, absent some actual showing of psychological or physical compulsion, promises, threats, or inducements, being interviewed by a law enforcement professional is not sufficiently "coercive" to result in a constitutional violation.

[11] *See, e.g.*, *Spring*, 479 U.S. at 576; *Moran v. Burbine*, 475 U.S. 412, 422 (1986).

[12] *Elstad*, 470 U.S. at 312.

tional requirements are stressed and utilized by law enforcement professionals throughout the country. Fred E. Inbau and John E. Reid pioneered the study of this field, developing the contemporary techniques of persuasion used in the interrogation of suspects. We recognize that the five justice majority in *Miranda* extensively criticized the techniques described in FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962) as representative of "inherently coercive" police procedures which "trade[ ] on the weakness of individuals." 384 U.S. at 455. Law enforcement's search for truth and inherent skepticism towards uncorroborated confessions were conveniently glossed over by the *Miranda* Court and are still ignored by other wholesale critics of police interrogation. Further, a fair reading of the procedures suggested by Inbau and Reid – reviewed free of "a deep-seated distrust of all confessions," 384 U.S. at 537 (White, J., dissenting) – yields the conclusion that there is nothing in these techniques that is inherently offensive to the guarantees of the Fifth Amendment.

Most importantly, none of the techniques would induce a balanced, innocent person to confess to a crime. As stated in the acknowledged "handbook," FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3rd ed. 1986) ("INBAU"):

> [W]e are unalterably opposed to the so-called "third degree," even on suspects whose guilt seems absolutely certain and who remain steadfast in their denials. Moreover, we are opposed to the use of *any* interrogation tactic or technique that is apt to make an innocent person confess. We are opposed, therefore, to the use of force, threats of force, or promises of leniency – any of which might well induce an innocent person to confess.

INBAU at xiv. The objective of an interrogation, simply speaking,

is to learn the truth.[13]

Inbau stresses the primacy of voluntary confessions to the truth-seeking process. The practitioner is warned even against indirect physical harms such as "unduly prolonged, continuous interrogation, especially by two or more interrogators working in relays, or the deprivation of food, water, or access to toilet facilities." INBAU at 214. The "trickery" within an interrogation is within societally accepted norms, is not an issue of constitutional import, and does not affect the voluntariness of a confession. Given the wide acceptance of the Inbau and Reid techniques, Inbau's emphasis upon learning the truth through constitutionally permissible means should obviate any concerns about systemic law enforcement overreaching.

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[13] *Amicus* American Civil Liberties Union ("ACLU") suggests that there is something untoward about not conducting an interrogation in a public place, and cites several "psychological studies" in support of its allegation that "tactics still endorsed in the interrogation manuals tend to promote false or untrustworthy confessions by implanting notions of guilt or implying leniency." Brief of *Amicus Curiae* the American Civil Liberties Union in Support of Petitioner at 15-16. Unexplained is how the studies prove *anything* about the actual interrogation of individuals suspected of often heinous crimes. *See, e.g.*, Saul M. Kassin & Katherine L. Kiechel, *Police Interrogations and Confessions: Communicating Promises by Pragmatic Implication*, 15 PSYCHOL. SCI. 233 (1991) (study concludes that an interrogation theme has the same psychological effect as a direct promise of leniency *based on student's estimate of how long fictitious suspects would be sentenced for based on a reading of fictitious trial transcripts*); Saul M. Kassin & Katherine L. Kieche, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL SCI. 125, (study concludes that accusations of guilt will cause innocent individual to believe they are guilty *based on students being told that if they pressed an ALT keyboard on a computer keyboard the computer would shut down*; students continued to type and the computer did shut down and 69% of the students subsequently signed a false confession where they admitted they pressed the ALT key) (One's lack of certainty regarding striking the ALT key would presumably be greater than whether one committed an affirmative, criminal offense.). *See* BRIAN C. JAYNE & JOSEPH P. BUCKLEY, THE INVESTIGATOR ANTHOLOGY 459-469 (1999) (rejecting the theories and conclusions espoused by the studies cited by the ACLU).

III. UNLIKE OTHER "PROPHYLACTIC" HOLDINGS OF THE COURT, THE *MIRANDA* FORMULA HAS NEVER BEEN HELD TO BE REQUIRED BY THE CONSTITUTION.

We agree with the Fourth Circuit that *Miranda* does not impose a constitutional requirement, but rather an extraconstitutional prophylactic rule that sweeps more broadly than the Fifth Amendment's right against compelled self-incrimination. The Solicitor General claims that "prophylactic" rules in many different contexts are not at all unusual, as if that fact somehow supports an argument that *Miranda* itself has a constitutional weight which precludes admission of non-*Mirandized* statements – even where there is no violation of the defendant's Fifth Amendment rights. Yet, careful reading of these other "prophylactic" cases reveals that the rule articulated in each instance is actually an expression of a constitutional requirement – not a "framework" fashioned by the Court to "sweep more broadly" than the underlying constitutional right. Arguments to the contrary fail to distinguish between rights established by pertinent provisions of the Constitution as interpreted by this Court, and the extraconstitutional exclusionary rule imposed by *Miranda*.

The fact that certain procedures determined to be *one* means of satisfying constitutional requirements are sometimes described as "prophylactic" does not change the fact that *Miranda*'s prophylactic rule is not a constitutional requirement. For example, the Solicitor General's reliance on a number of this Court's cases involving effective appellate representation for indigents to support its argument is unavailing. The Court's decisions regarding the right to such representation involve the straightforward review of whether particular procedures satisfy constitutional requirements. Thus, in *Anders v. California*, 386 U.S. 738 (1967), the Court found that a state procedure for withdrawal of appointed appellate counsel was unconstitutional and suggested a procedure that would satisfy such requirements. In *Smith v. Robbins*, 120 S. Ct. 746 (2000), the Court recognized that a later California procedure, which differed in material respects from the *Anders* procedure, also satisfied constitutional requirements. Although *Robbins*

referred to *Anders* procedures as "prophylactic," *id.* at 13, 28, it made clear that adequate safeguards to assure that an appeal is adequate and effective are constitutionally required:

> [T]he *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals . . . . We think it clear that California's system does not violate the Fourteenth Amendment . . . . we cannot say that it fails to afford to indigents the adequate and effective appellate review that the Fourteenth Amendment requires.

Id. at 759-60.

The question in *Anders* and *Robbins* was not *whether* procedural protections for the defendant were constitutionally required, but rather, whether specific procedures were constitutionally adequate. In contrast, the *Miranda* procedures are not constitutionally required to comply with the Fifth Amendment. In determining the propriety of changing procedures through legislation, the question is whether a constitutional provision requires some procedures. If not, passing references to the phrase "prophylactic rule" cannot preclude a legislative response which replaces judicially-crafted procedures.

Similarly, because Miranda's *per se* rule does not protect an underlying constitutional right, this Court's holding that due process may require a *per se* rule in other contexts does not elevate *Miranda* to constitutional dimensions. Petitioner and the Solicitor General attempt to disregard the clear holdings of these decisions on the ground that the evils these rules aim to prevent do not invariably occur if the rules are not observed. In their view, it then follows that these are not constitutional due process rules – notwithstanding the Court's explicit holdings that they are. Thus, Petitioner's and the Solicitor General's references to the *per se* rule in *North Carolina v. Pearce*, 395 U.S. 711 (1969), described in later cases as "prophylactic," does not detract from the fact that the rule in *Pearce* (holding that an articulated non-vindictive reason must be provided for an increased sentence following a successful appeal) is required as a matter of constitutional due proc-

ess:

> We . . . consider . . . what *constitutional limitations* there may be upon the imposition of a more severe sentence after reconviction. . . . Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, *due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge*. . . . In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.

Id. at 717, 725-26 (emphasis added).

The logical extension of this rule in *Blackledge v. Perry*, 417 U.S. 21 (1974), which held that a state may not respond to a defendant's seeking a trial *de novo* in a two-tier system by charging a more serious offense, both affirmed the constitutional underpinning of *Pearce* and further emphasized:

> *Due process of law requires* that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process. We hold, therefore, that it was *not constitutionally permissible* for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*.

417 U.S. at 28-29 (emphasis added).

In sum, the cases cited by Petitioner, the Solicitor General and various *amici* are inapposite to the issues raised by the extra-constitutional prophylactic rule of *Miranda*. In each such case, this Court determined that the Constitution required the proce-

dures or *per se* rules mandated therein.[14] For instance, it is this Court's determination that the rules in *Pearce* and *Blackledge* are required by due process which give them constitutional weight; the fact they exist as *per se* rules does not negate the fact that those decisions implement constitutional requirements, as interpreted by this Court, rather than impose judicially-crafted prophylactic rules which are not required by the Constitution.

In contrast, the *Miranda* warnings have never been understood to be themselves required by the Fifth Amendment.[15] Thus, the *Miranda* rules cannot be understood as due process requirements on the model of *Pearce* and *Blackledge*, or as constitutionally required procedures on the model of *Anders* or *Robbins*. Neither are those cases demoted to extraconstitutional status, like *Miranda*, because they are sometimes *described* as prophylactic. While procedures or rules may be prophylactic in the sense that they protect against certain violations of defendants' rights or other evils, the determination of constitutional status is made by reference to what the Constitution *requires*. In the absence of this Court holding that a procedure or rule is constitutionally required, the legislative branch retains its primacy over policy matters.

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[14] *See also Bruton v. United States*, 391 U.S. 123, 137 (1968) (non-hearsay admission of nontestifying co-defendant's confession violates Sixth Amendment as a limiting instruction and inadequate "substitute for *petitioner's constitutional right of cross-examination*.") (emphasis added); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (privilege immunizing honest misstatements of fact "is *required by the First and Fourteenth Amendments*.") (emphasis added); *Gertz v. Welch*, 418 U.S. 323, 341 (1974) ("The *First Amendment requires* that we protect some falsehood in order to protect speech that matters.") (emphasis added). Other cases cited are similarly distinguishable from *Miranda* by this Court's determination that the decisions were *required* by specific constitutional provisions.

[15] *See United States v. Dickerson*, 166 F.3d 667, 688 (4th Cir. 1999) (citing cases).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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